SUPREME COURT, U.S.

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In The

Supreme Court of the United States

October Term, 1973

No. 73- 1727

SALVATORE CIOFFI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No. 73-

SALVATORE CIOFFI,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that this Court grant a writ of certiorari to review the orders of the United States Court of Appeals for the Second Circuit rendered the 14th day of March, 1974 and the 18th day of April, 1974, upon rehearing, affirming the judgment of conviction for obstruction of justice and denying a rehearing thereon, respectively.

The petitioner had been tried in the United States District Court for the Southern District of New York before Honorable Constance Baker Motley, D.J. and a jury, for obstruction of justice (18 U.S.C. Section 1503) and on the 23rd day of October, 1973, was convicted. The Court imposed an 18 month sentence, the commencement of which has not yet occurred since bail pending appeal was granted.

OPINION BELOW

The Court rendered an opinion which is reproduced as an appendix herein.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). The order denying a rehearing was made the 18th day of April, 1974.

QUESTIONS PRESENTED

1. Whether this Court's plurality opinion in *United States v. White*, 401 U.S. 745, which concerned a case predating *Katz v. United States*, 389 U.S. 347, was intended to permit secret recordings of conversations between a Government agent and a defendant merely because the Government agent consented to the electronic surveillance?

2. Whether *United States v. White*, 401 U.S. 745, should be limited to the peculiar circumstances of that particular case and whether this Court should now declare that recordings of conversations shall be inadmissible without a court order authorizing electronic surveillance, unless both parties consent to the electronic surveillance?

3. Whether petitioner was denied a fair trial and deprived of due process of law by the Trial Court permitting a Government witness to testify as to the meaning of recorded conversations between the witness and Cioffi in view of the fact that there were no esoteric code words used and nothing of a technical nature involved?

4. Whether petitioner was properly convicted of obstruction of justice under 18 U.S.C. Section 1503, in view of the fact that he is not alleged to have uttered any threats or to have otherwise intimidated any witness?

5. Whether advising a prospective witness before a Grand Jury that he has a right to assert the Fifth Amendment against self-incrimination in response to questions, can constitute obstruction of justice under 18 U.S.C. Section 1503?

6. Whether petitioner's rights of confrontation under the Sixth Amendment of the United States Constitution were unduly curtailed in view of the doctrine of *Chambers v. Mississippi*, 410 U.S. 284, when the Trial Court ruled that cross-examination of the crucial witness Scheer, without whose testimony there could have been no conviction, must be limited to actual convictions, despite the fact that defense counsel had alerted the Court to several incidents which could have been the subject of prosecution had Scheer not been made a Government witness?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments of the United States Constitution are involved herein, as well as 18 U.S.C. Sections 1503, 3500 and 891.

SUMMARY OF THE FACTS

Introductory

The petitioner herein stands convicted of obstruction of justice and conspiracy to obstruct justice. The only co-conspirator and co-defendant named in the case was Dominick Bassani, who was not tried. One Joseph Mirando, who had, during the incidents mentioned in the indictment, been indicted for extortionate credit transactions under the new organized crime statutes (18 U.S.C. Section 891, etc.), was described as a co-conspirator in a bill of particulars furnished by the prosecution.

The thrust of the Government's case was that the petitioner had conspired with Mirando and Bassani to threaten and intimidate Perry Scheer, a Government witness, with respect to his testimony before a Grand Jury. The Grand Jury before which Scheer was subpoenaed at the time that he first met Cioffi, around March 25, 1972, had been investigating stock manipulations in Allstate Metal Stamping Corporation stock and other securities violations.

It was, therefore, essential that the Government establish that any threats or intimidations against Scheer produce an effect which would prevent justice from being duly administered with respect to the Grand Jury before whom he had been subpoenaed. It is submitted, however, that no evidence of any threats or coercion from Cioffi directed against Scheer were established by the prosecution.

About two and a half months before Cioffi ever met him, Scheer had had a conversation with Joseph Mirando concerning proposed testimony in the impending Mirando indictment. When Cioffi met him, however, Scheer could not possibly be influenced or intimidated concerning the Mirando indictment because it was nearly a *fait accompli.* Thus we have the anomalous situation in this case that Cioffi has been accused of conspiring to influence a Grand Jury proceeding which was not directed against Mirando.

It is significant that Scheer was the only Government witness against Cioffi.

Scheer was connected with a brokerage, Kelly, Andrews and Bradley who had committed fraudulent practices in violation of the securities laws. In addition, Scheer had apparently larcenously pledged certain stock of one Joseph Mirando with a bank for a loan.

Scheer, therefore, was liable to prosecution on several counts and had every motive in the world to lie and deceive for his own salvation and quest to avoid jail. The firm with which he was connected also committed criminal violations.

In this context, the widest latitude should have been given to cross-examination of this witness. Instead, the Court limited the scope to actual convictions. He had apparently been involved in at least seven illegal transactions, but the Court would not let counsel probe these in his cross-examination.

There was no evidence that the petitioner had sought to influence Scheer's testimony with respect to Joseph Mirando, who had apparently been indicted for loan sharking and extortionate credit transactions, but had not been tried therefor. The indictment was not affected by Cioffi's talks with Scheer.

Yet, during the direct examination of Scheer's uncle, Alex Goldstein, the prosecutor elicited that some dates had been written on a piece of paper which the witness said bore a court seal. Goldstein had neither read the paper, nor did he know if the seal was in fact a court seal or if so, what court. (Corporations, notaries etc. also sometimes "seal" papers.)

Using this pretext as an apparent excuse, over objection and motion for mistrial, the Government was permitted to read into evidence the entire indictment against Mirando for extortionate extensions of credit. There was no information given to the jury that Mirando had not yet been tried on the indictment. Moreover, it appears that if Scheer had testified with respect to that indictment, if he in fact did at all, had done so *before* he ever met the appellant.

Additionally, the charge of the Court insinuated that the jury might find that petitioner had conspired with Mirando, who, however, was not mentioned in the indictment as a co-conspirator at all.

The Court also suppressed certain 3500 material which it ordered sealed.

The prosecution was permitted to adduce evidence of events which antedated Cioffi's acquaintance with Scheer and which preceded the conspiracy as charged.

An F.B.I. agent, although neither qualified as a lawyer or expert in law, was permitted to instruct the jury, in effect, as to what the interpretation of extortionate credit transactions were and who the F.B.I. usually investigates in such cases — self-serving entirely.

The witness, Scheer, was permitted to testify as to his interpretation of certain words used in conversations with Cioffi. Nothing esoteric was involved. Admittedly, there were no direct threats by petitioner against Scheer.

Since this was a one-witness case, the use of another indictment (Mirando's) and inferences of a connection between Cioffi and Mirando, coupled with the circumscribing of cross-examination conjoined to create such a prejudicial atmosphere that no fair trial was possible. Allowing Scheer to interpret common words was so prejudicial as to warrant reversal as a matter of law.

The Trial

Perry Scheer testifying for the prosecution stated that he had been employed with Kelly, Andrews and Bradley, a brokerage firm, dealing in stocks, from June 1970 to October 1971. (Kelly, Andrews and Bradley is sometimes hereinafter called KAB (86a-89a)). [1]

1. Numerals with suffix "a" refer to Appendix.

KAB employed Scheer, he said, as a registered representative. As such he could buy and sell stock (86a-88a).

Scheer said that he knew a person named Joe Mirando at a time that the United States Attorney and the S.E.C. were investigating KAB (88a).

Scheer was permitted to testify about a conversation he had with Mirando which occurred before the alleged conspiracy commenced as charged in the indictment. Scheer said he asked Mirando not to hurt him — that he was sick. The Court refused to sustain defense objections to these conversations (91a-99a). [2]

The indictment charged Cioffi with a conspiracy with Dominick Bassani and persons unknown. Mirando was *not* named as a co-conspirator and therefore hearsay statements of Mirando were erroneously admitted.

Scheer said that his Grand Jury testimony involved an investigation by the Government into a manipulation of Allstate Metal Stamping Corp. stock. The Court even permitted the witness Scheer to relate what he had testified to before the Grand Jury. This was obviously not binding on Cioffi and was self-serving (105a-108a). [3]

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2. The indictment charged a conspiracy commencing March 25th, but the Mirando talks were back in January.

3. In essence, the Grand Jury minutes of Scheer were thereby introduced which constituted improper "corroboration" of Scheer, although at that time, no prior inconsistency had been alleged. This improperly bolstered his credibility.

KAB had obtained a loan from Mirando, Scheer asserted and were unable to pay the interest thereon. He said that Mirando took over the operations of KAB in August and September of 1971. Scheer recalled that one A. H. Simon had been threatened by Mirando when he could not pay for some stock (105a-108a).

After testifying in the Grand Jury, Scheer said that he received a call from his uncle, Alex Goldstein who told him that some people wanted to speak to him (109a-111a).

A meeting was arranged at the New York Coliseum with Cioffi and another man. Cioffi said he had heard of his problems and that he shouldn't worry about the loan from Mirando or the interest thereon — that petitioner could help him. Mirando had lent Scheer $25,000 at KAB in October 1970. He stated that he was paying an exorbitant amount of interest. He recalled that Mirando had threatened him about the loan (110a-129a).

Cioffi, Scheer said, told him that if he took the "Fifth Amendment", there would be no case concerning Allstate (112a-114a).

Scheer remembered that he had begun to cooperate with the Government in November 1971 and had obtained immunity. He also testified that on two occasions, May 18 and June 1st, he had been equipped with a listening device and recorded certain conversations with Cioffi, without the consent or knowledge of petitioner (121a-123a).

Scheer admitted that he was involved in at least seven illegal transactions, but the Court refused to permit the defense to go into any details of these. The Court stated that since the concession of the Government that these derelictions had occurred would be given, that the defense was foreclosed from cross-examination as to these matters (188a-194a).

The defense did not want any concession. The Trial Judge told defense counsel that "he had an appeal."

Scheer said that petitioner had never threatened him. The tapes were played over objection and the Court permitted Scheer to give his interpretation of what certain words meant (154a-168a).

Alex Goldstein testified that he was Scheer's uncle and acknowledged that he had arranged certain meetings with Scheer and Cioffi at the Coliseum in March and thereafter (8a-14a).

Goldstein recalled that Cioffi had a shown the witness a piece of document bearing a seal in July or early August (14a-15a). Goldstein had not read or studied the piece of paper and did not know what it was. Nevertheless, over objection and motion for mistrial, the Government introduced Exhibits 3 and 4 which were an indictment and part of an indictment against Joe Mirando and had nothing to do with Cioffi (16a-19a).

A vehement motion for a mistrial was made setting forth the substantial prejudice that the reading of the Mirando indictment had created (22a-24a). The Court however was unmoved. It must be born in mind that the

witness Goldstein had acknowledged that he had *never read* the document so it was speculative that the indictment was even the same paper shown to the witness! (24a, 77a-80a).

Goldstein said that petitioner never threatened Scheer to his knowledge (26a).

Merrill Parks, an FBI agent testified that he was with the organized division (28a). [4]

Over objection, this witness was permitted to give a legal lecture to the jury as to the law on extortionate credit transactions and who is usually investigated in such cases (31a-33a). The Court in effect, abdicated her role as Judge, since only she should have interpreted the law. Moreover, this did not have anything material to do with the case on trial but only served to explain the indictment of Mirando which had been introduced over objection. The Court did not explain this adequately to the jury (30a).

It was conceded that Scheer had never directly testified in the Mirando presentation (78a-79a).

The Court sealed and refused to turn over to the defense under 18 U.S.C. Section 3500, certain exhibits for identification, i.e., 3509, 3512, 3518, 3519, 3521, 3522, 3528, 3529 and Exhibits 1 and 2 (255, 256).

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4. This was prejudicial as it injected a reference to organized crime and it must be inferred that it was calculated to prejudice defendant (*Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966)).

The tapes primarily concerned efforts to get back Mirando's stock which Scheer had larcenously pledged with the Bank of North America. Mirando has sued on this matter.

In its charge, the Trial Court told the jury that the Government urged that Mirando was a co-conspirator, although clearly not mentioned as such in the indictment.

The Trial Judge refused a clarifying instruction when an exception was voiced.

REASONS FOR GRANTING THE WRIT

I.

The Government equipped a cooperating undercover witness, Scheer, with electronic listening devices which were used to record conversations between petitioner and Scheer. Since no court order authorizing such electronic surveillance was obtained, nor did petitioner consent thereto, Cioffi urges that this violated his rights of privacy under the Fourth Amendment and constituted a deprivation of due process of law under the Fifth Amendment of the United States Constitution. Moreover, petitioner urges that United States v. White, 401 U.S. 745, was incorrectly applied as the basis for authorizing such invasion of privacy.

The Government elected to use electronic surveillance in this case, probably in an attempt to corroborate the statements of their single most important witness, Scheer.

The use of electronic surveillance where only one party consents to the eavesdropping has been employed very widely since the Supreme Court's decision in *United States v. White*, 402 U.S. 745. It, of course, had also been used previous thereto, but many law enforcement agencies apparently look upon *White* as authorization or *carte blanche* to use this method of electronic surveillance.

It is respectfully contended that *White* was a plurality opinion of the Supreme Court of the United States and concerned a case which predated *Katz v. United States*, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States*, 343 U.S. 747 and *Lopez v. United States*, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "*reasonable expectation of privacy*" standard of *Katz v. United States*, 389 U.S. 347, and we maintain should therefore be abolished. (See *Holmes v. Burr*, 9 Cir. 1973, F.2d , 14 Cr.L. 2060.)

It will be reaclled that Justice Black's cryptic concurrence in *United States v. White*, *supra*, mentioned the fact that it did not apply since this was pre-*Katz* eavesdropping.

Justice Black cast the "swing" vote in *United States v. White* and his concurrence in the judgment of the Court

was for the reason set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364. He, however, also noted "his adherence" to "his views expressed in *Linkletter v. Walker*, 381 U.S. 618." In *Linkletter*, Mr. Justice Black maintained that *Mapp v. Ohio*, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White*, Justice Black reasserted the position which he had taken in *Katz* namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States*, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of *Katz v. United States*.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; and (3) that the exclusion of evidence obtained in this way hurts society. *These arguments do not hold up.*

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial expressions, guestures, and other subtle details. Nor is a picture any more accurate. But the reliability argument

really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument.

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?"

(Dissent of Hufstedler, J. in *Holmes v. Burr, supra.)*

The dissenting opinion in *Holmes v. Burr, supra,* went on to explain the impact of warrantless surveillance.

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation . . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States.* There the Court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subjected to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of the risk fictions relied on in *On Lee v. United States, supra,* 343 U.S. at 753-54 and *Lopez v. United States, supra,* 373 U.S. at 439. In *Lopez* the majority added the variation that a person talking face-to-face with a known Government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality on *United States v. White.*

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz*. Thus, *On Lee* and *Lopez* not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States*, (1961) 365 U.S. 505; *Osborn v. United States*, 385 U.S. 323, and *Berger v. New York*, 388 U.S. 41, and destroyed by *Katz*.

Rathbun v. United States, (1957) 355 U.S. 107 dealt with Governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. Section 605). *Schwartz v. Texas*, (1952) 344 U.S. 199 involved facts similar to *Rathbun*, but the decision was based on the pre-*Mapp* authority refusing to apply the exclusionary rule to state Courts. *Schwartz* was overturned by *Lee v. Florida*, (1968) 392 U.S. 378, a post-*Mapp* case, holding inadmissible under Section 605 telephone conversations overheard on a party line and recorded. *Lewis v. United States*, (1966) 385 U.S. 206 and *Hoffa v. United States*, (1966) 385 U.S. 293, like *Holmes*, concerned the use of confidants who were secretly Governmental informers, but in neither case was electronic surveillance employed.

The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes*. But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided, and *Katz* had been earlier held nonretroactive in *Desist v. United States*, 394 U.S. 244, *United States v. White*, is nevertheless important because it reveals

continuing reliance by some of the Justices on the assumption of the risk doctrine. (See *United States v. White*, at 754 (White, J.).)

Although the holding in *White* was based upon the nonretroactivity of *Katz*, several of the Justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested that *On Lee* remained sound law. Justices Brennan, Douglas, Harlan and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz*. Mr. Justice Black, concurring in the judgment of the Court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that electronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of Government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr, supra*, sets forth a cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 14 Cr.L. 2063, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the redominant remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

We recognize that this Court has not specifically interpreted the significance of *United States v. White, supra*, since its promulgation of this Tribunal. Apparently the Court below, as well as prosecutors, have assumed that invasions of privacy are perfectly legitimate so long as one party to a conversation consents.

In *Katz v. United States, supra*, we submit, this Court indicated a contrary sentiment, namely that the Fourth Amendment protects people and not places. Moreover, the clear thrust of *Katz* is that the party to whom *Katz* placed

a call on the public telephone booth that was "bugged", could not have consented to the "bug" which was placed without a warrant.

In *Berger v. New York*, 388 U.S. 41, this Court recognized that invasions of privacy by electronic listening devices represents one of the most dangerous and fearsome incursions upon privacy and civil liberty.

United States v. White, supra, represents a plurality opinion only and has never been dealt with by a majority of the Court.

In *Gelbard v. United States*, 408 U.S. 41, this Court indicated that a person who has suffered an invasion of privacy through illegal methods cannot even be made the subject of a Grand Jury subpoena if the purpose is to examine him concerning material obtained through improper electronic surveillance. We submit that petitioner herein had every reason to believe that his conversations with Scheer were not being recorded and were private. Scheer was obviously playing out a scenario suggested to him by the authorities and, consequently, elicited conversations designed to incriminate. There was no free and natural flow of conversation from the standpoint of Scheer. This was an undoubted invasion of privacy from the viewpoint of Cioffi.

We submit that under those circumstances a Court order should have been obtained before the Government undertook to equip Scheer with this listening device.

We remind this Tribunal that in *Osborn v. United States*, 385 U.S. 323 at 330, this Court explained that since District Judges granted what amounted to a warrant authorizing the use of a recording device, that this was the only reason for upholding the invasion of privacy apparent therein. This Court explained:

> "There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance'."

In *Russell v. United States*, 411 U.S. 423, this Court indicated that "outrageous" conduct by law enforcement officers or agents would be dealt with in an appropriate manner.

Similarly, in *Lee v. Florida*, 392 U.S. 378, this Court made it clear that barring such improper eavesdropping was the only effective deterrent to such lawless conduct.

We urge this Court, therefore, to clarify *United States v. White, supra*, and rule that a court order is required before any electronic surveillance, even with the consent of one party, is conducted under Government auspices, otherwise the evidence must be suppressed.

II.

There is a dichotomy of opinion among some of the circuits as to the interpretation of the obstruction of justice statute – the Second Circuit taking a much broader view than the Ninth and Sixth Circuits. This Court should, accordingly, grant certiorari to resolve these differences and to clarify the law in this field.

The essence of the conviction herein, according to the opinion of this Court, was obstruction of justice. It appears, however, that the Court below found that Judge Motley's instruction to the jury to the effect that Cioffi would have violated Section 1503 of Title 18 United States Code, even if he merely advised the witness Scheer to invoke the Fifth Amendment before the Grand Jury, was correct. This is based upon *Cole v. United States*, 9 Cir. 1964, 329 F.2d 427, but what this bench may have overlooked is that there was nothing in the indictment charging Cioffi with that.

We do not believe that there is any dispute over the fact that there were no classical overt threats made by Cioffi against Scheer or anyone else. At most there was a discussion which involved inquiries concerning the health of Scheer's wife and conversations along those lines. We submit that this is quite an extension of the interpretation of Section 1503 to assume and to hold that conversations of this sort are inherently coercive or threatening.

What is more disturbing, however, is the fact that both Judge Motley and the Court below hold that advising a witness to invoke the Fifth Amendment constitutes

"obstruction of justice". The indictment herein says nothing whatsoever about advising a witness to invoke the Fifth Amendment and, as a matter of fact, there is no evidence that the Grand Jury ever charged the petitioner herein with obstructing justice by advising Scheer to invoke the Fifth Amendment. If, indeed, the Grand Jury did not so charge, then Cioffi has been convicted of a crime which was never charged in any indictment.

The Fifth Amendment of the United States Constitution specifically declares that "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury . . . ".

The United States Attorney has no right to amend an indictment to add a charge which the grand veniremen have not returned. (*Ex Parte Wilson*, 114 U.S. 417, 428; *Mackin v. United States*, 117 U.S. 348.)

Certainly there is no allegation herein that the petitioner in any way waived his right to Grand Jury indictment. (*Smith v. United States*, 360 U.S. 1.)

We sould ask this Court, therefore, to review the Grand Jury minutes to determine whether or not there was any basis for submitting the issue concerning the invocation of the Fifth Amendment as part of the crime which was allegedly committed. *Stirone v. United States*, (1960) 361 U.S. 212; *Ex parte Bain*, 121 U.S. 1, 30 L.Ed. 849 at 852, 853 (1887).

Petitioner, however, submits that even assuming *arguendo* that the minutes of the Grand Jury referred to this allegation, the failure of the indictment itself to contain any such charge precluded the Trial Judge from instructing the jury that they could bring back a verdict on that basis. By virtue of the general verdict of the jury, it is, of course, impossible to determine specifically on what basis the conviction was rendered and, therefore, we have a right to assume that the conviction was predicated upon Cioffi's suggestion to invoke the Fifth Amendment. (*Jackson v. Denno*, 378 U.S. 368.) The possibility of prejudice requires reversal (*Chapman v. Calif.*, 386 U.S. 18, 23).

We submit that the Court below necessarily assumed that generic threats were sufficient to warrant a charge to the jury that obstruction of justice might have been committed. It is one thing, however, to threaten a witness, but quite another to merely advise him of a constitutional right. The advice must be corruptly given.

We recognize that, un fortunately, in this Circuit a very broad construction of obstruction of justice has been applied. (*United States v. Rosner*, 485 F.2d 1213, and *United States v. Alo*, 439 F.2d 751, cert. denied 404 U.S. 850.)

As this Court is aware, however, other Circuits have been much narrower in their interpretation of obstruction of justice and, consequently, we suggest that a split exists in the interpretation of this statute. (See *Haili v. United States*, 260 F.2d 744 (9th Cir. 1958); *United States v. Essex* 407 F.2d 214 (6th Cir. 1969); and *United States v. Scoratow*, 137 F. Supp. 620 (W.D. Pa. 1956)).

Where there is a dichotomy of interpretation among Circuits, we urge that such is an appropriate situation wherein reconsideration of a particular rule should be considered *en banc*.

The language of Section 1503 is such that it seems to be limited to situations enumerated therein. The statute, so far as applicable, reads as follows:

18 U.S.C. Section 1503:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States of before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the Unites States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly

> or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The doctrine "*Ejusdem generis*", if applied literally, as we maintain it should, would seem to preclude conviction in the case at bar, particularly in view of the fact that the witness Scheer was a Government agent and was not directly involved in testifying in the Mirando matter.

This Circuit, however, in *United States v. Alo, supra*, has rejected the application of the "*ejusdem generis*" principle to 18 U.S.C. Section 1505. (See, *United States v. Cohn*, 452 F.2d 881 (2 Cir. 1971), cert. denied 405 U.S. 975).

In *United States v. Essex, supra*, however, the Sixth Circuit adopts a much narrower interpretation of obstruction of justice.

It should be noted further that 1503 of the statute originated with the Act of March 2, 1831, 4 Stat. 487.

The 1831 Act was intended to be "declaratory of the law concerning contempts of Court". The power of the United States Courts to punish for contempt "in any cause or hearing before the same" had been recognized earlier by the Judiciary Act of 1789, 1 Stat. 83. In Section 1 of the Act of March 2, 1831, Congress restricted contempt jurisdiction and its summary proceedings to misbehavior

occurring only in the presence of Courts "or so near thereto, as to obstruct the administration of justice," see *Nye v. United States*, 313 U.S. 33, 61 S. Ct. 810, 85 L.Ed. 1172 (1941). With Section 2 of the 1831 Act, the predecessor of the statute before us, Congress provided that contempts occurring beyond the presence of Courts should be punishable by indictment and trial, and with all the safeguards thereof.[5] The end result was this: Section 1 provided that if conduct amounting to contempt of Court occurred in the presence of the Court, the contemnor could still be punished summarily. And Section 2 provided that if contemptuous conduct, "influencing or inju ing officer[s], juror[s], or witness[es]" in particular, occurred away from the Court, the offender was to be dealt with by indictment. *Savin, Petitioner*, 131 U.S. 267, 9 S. Ct. 699, 33 L.Ed. 150 (1889). The principal distinction then, between Section 1 and Section 2 of the Act of March 2, 1831, aside from the added procedural safeguards under the latter, was geographical; they both proscribed contemptuous conduct, i.e., obstruction of Court proceedings, *United States v. Seeley*, 27 Fed. Cas. p. 1010, No. 16, 248a (C.C.N.Y. 1844).[6] Sections 1 and 2 of the

5. See Note, 28 Colum. Law Rev. 401 (1928). The author expresses the view that the intent behind Section 2 of the 1831 Act was to transfer certain denominated contempts to the category of indicatable misdemeanors. Id. at 531. These were "constructive contempts" because the acts listed in Section 2, though causually related to the disruption of court proceedings did not directly interfere with them. *United States v. Seeley*, 27 Fed. Cas. p. 1010, No. 16,248a, C.C.N.Y. 1844.

6. In *Savin, Petitioner*, 131 U.S. 267, 9 S. Ct. 699, 33 L.Ed. 150 (1889), the Court recognized that an act of misbehavior, though covered in Section 2 of the Act of March 2, 1831, would be contempt if committed in the presence of the Court.

Act of March 2, 1831 are now part of our present statutory scheme as 18 U.S.C. Section 401, which condemns obstructive acts in the Court's presence, and 18 U.S.C. Section 1503, which prohibits contemptuous conduct away from Court,[7] respectively. (See, *Essex, supra.*)

It is therefore obvious that obstruction of justice really is a type of contempt of Court which is committed outside the presence of a judge.

We submit that the type of conduct here involved, particularly if we assume that it includes the possibility that the jury believed only that Cioffi advised the taking of the Fifth Amendment, could not be contempt of Court and, consequently, should not be deemed obstruction of justice.

Moreover, since this is a criminal statute, it should be narrowly construed and not broadly construed.

There was no possibility of obstruction in the case at bar, moreover, since the "witness" Scheer was working with the Government and whatever testimony he might give relative to Mirando was already academic as the presentment before the Grand Jury was complete. (See,

7. Section 1 of the 1831 Act was reenacted as Rev. Stat. 725, and then became 18 U.S.C. Section 401, "Power of Court". Section 2 of this Act, reenacted as Rev. Stat. 5399 became 18 U.S.C. Section 1503. The Supreme Court recently limited the power of Courts to deal with contemnors by summary proceedings under Section 401. *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L.Ed. 522 (1968).

United States v. Thomas, D.C. Va., 47 Fed. 807 (1891); *Harrington v. United States*, C.C.A. 8, 167 Fed. 97.

We must remember that there were no threats actually proved except those of Mirando prior to the entry of the petitioner into the alleged conspiracy. The Trial Court therefore, permitted the jurors to speculate as to what had occurred; i.e., had there been threats or merely advice as to Scheer's right to take the Fifth Amendment. Scheer had admittedly committed crimes against Mirando, and was subject to prosecution by the S.E.C. How could the suggestion that Scheer had a right to assert the Fifth Amendment under such circumstances be deemed "corrupt" or obstructive? (*United States v. Herror (Cal.)*, 28 F.2d 122 (1928)).

III.

It was improper for the Trial Court to permit the main witness, Scheer, to give his subjective interpretation of perfectly clear, unequivocal language on certain tape recordings, especially since no code words were used. This deprived petitioner of a fair trial under the Fifth Amendment.

We know that this Court will review, if it so chooses, the briefs and records in the Courts below.

Among the serious errors which we feel were committed was the fact that the crucial prosecution witness, Scheer, was permitted to give his own peculiar interpretation of the meaning of certain words, despite the

fact that this case did not involve the use of "code words", nor did it involve any technical matters which would require such interpretation. In essence, therefore, the jurors were influenced in a manner in which the Trial Court should not have permitted and we submit that this constituted a deprivation of a fair trial in violation of the Fifth Amendment.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX A
OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 696—September Term, 1973.

(Argued January 25, 1974 Decided March 14, 1974.)

Docket No. 73-2612

UNITED STATES OF AMERICA,

Appellee,

v.

SALVATORE CIOFFI,

Appellant.

Before:

MEDINA, MOORE and OAKES,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge.*

Salvatore Cioffi appeals from a judgment entered upon the verdict of a jury convicting him of conspiracy to obstruct justice and with obstruction of justice by endeavoring to influence a witness, in violation of 18 U.S.C., Sections 371 and 1503. Affirmed.

JOHN TIMBERS, Assistant United States Attorney, New York, N.Y., (Paul J. Curran, United States Attorney for the Southern District of New York, Elliot G. Sagor and S.

Andrew Schaffer, Assistant United States Attorneys, New York, N.Y., on the brief), *for Appellee.*

Irving Anolik, New York, N.Y., *for Appellant.*

Medina, *Circuit Judge:*

The jury, after a trial presided over by Judge Motley, found Salvatore Cioffi guilty on both counts of an indictment charging him with conspiracy to obstruct justice and with the obstruction of justice by endeavoring to influence Perry Scheer, described as "a witness in the United States District Court for the Southern District of New York, having been duly subpoenaed to appear before a Grand Jury duly empaneled and sworn in that Court," and he appeals from the judgment of conviction. He was sentenced to concurrent terms of eighteen months imprisonment on each count and is enlarged on bail pending the determination of this appeal.

A thorough examination of the entire transcript, the exhibits and the sealed envelopes containing a quantity of alleged 3500 material that was withheld from counsel for Cioffi has convinced us that there is no merit in any of the claims of error, and that there was ample proof sufficient to sustain the verdict. We affirm the judgment appealed from.

The simplicity of the basic issue will, we think, be brought into focus if we first describe the background leading to the alleged conspiracy and then follow chronologically the acts and conversations of Cioffi that were found by the jury to have constituted the commission of the substantive crime of violating the Obstruction of Justice Act, 18 U.S.C., Section 1503.[1]

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1 18 U.S.C., Section 1503. Influencing or injuring officer, juror or witness generally

I

Background

As so often in the past we are again in this case dealing with a so-called brokerage house operating on the New York Over-the-Counter Exchange. This firm of Kelly, Andrews & Bradley when the market was "hot" made a specialty of floating numerous underwritings of new issues of stocks of little or no value and by various deceptive and illegal practices mulcting investors. There is testimony that there was no Kelly, no Andrews and no Bradley. In any event the three persons in charge of operations at first were Stuart Schiffman, known as Stuie, Fred Miller and Perry Scheer, who turned out to be the principal witness against Cioffi. These three were all "registered representatives," which meant that they were licensed to buy and sell securities.

The activities of the firm evidently attracted the attention of Joseph Marando who decided to muscle in and

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Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

who knew just how to do this. So, in October 1970 we find Marando making a loan of $25,000 to Schiffman, Miller and Scheer. This, however, was no ordinary loan but was a clear violation of the New York Criminal Law, New York General Obligations Law, Section 5-501, because it was agreed that interest at the rate of 104% per annum should be paid in weekly amounts of $500 or 2% each, in cash. The language of the professional criminal element in New York City was well known to all these people and cash was called "green" and the extortionate interest was called vigorish or "vig." This is reminiscent of what we read in the testimony in *United States* v. *Corallo*, 413 F.2d 1306 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969) and *United States* v. *Callahan*, 439 F.2d 852 (2d Cir. 1971). In his testimony Scheer, in his colorful way, always referred to this as a "shylock" loan. In any event, it is right in the center of the case against Cioffi. From the cases we have had before us in the past we think it is pretty clear that such extortionate loans are often made to those making quick profits from criminal enterprises of one kind or another, and, when the "vig" is not promptly paid something is apt to happen.

The following is Scheer's description of what happened when the "vig" on this $25,000 loan was not forthcoming:

> Q What happened after October 1970 with respect to payments on that loan?
>
> A The firm paid the weekly interest rate and when the first (sic) had difficulties, as many brokerage firms did, Mr. Marando became very violent and very upset that the interest always had to be met no matter what happened and he voiced threats of physical harm and violence and he always sat in Mr. Schiffman's seat and he threw everything off the desk, the blotters, the notes, the telephone, the telephone book, the coffee,

whatever was there violently, saying that if we were ever late, which we were from time to time, he would send collectors to our home to take our wives or our furniture, whatever he could get. The money had to be paid on time.

Q By the way, had you discussed your wife's medical condition with Marando?

A Yes, he was very aware of it.

We shall hear further references to the health of Scheer's wife, who had cancer and was "totally disabled."

In August or September of 1971 Marando took over the day to day operations of Kelly, Andrews & Bradley and he had to find buyers for the stocks. One of these was a Mr. Simon who did not pay for the stock he bought. Scheer testified to a telephone conversation he heard in the office when Marando asked for the money that was due. Marando asked Simon on what floor he was located. When told it was the 27th or 30th floor Marando said that is how far you will bounce unless you come over immediately and pay for the stock you bought. Scheer says then Simon came over as requested. Judge Motley permitted the testimony as to these events, which preceded the first overt act of March 30, 1972 as alleged in the conspiracy count of the indictment. Judge Motley ruled that such testimony was allowed as background information so that the jury could understand the charges against the defendant.

As things went from bad to worse and it was necessary to give some support to the capital structure of the firm, Marando sent over 90,000 shares of Brooklyn Poly Industries stock to be subordinated and kept intact for the protection of the firm's creditors. These shares were in street names so Schiffman promptly siphoned off part of the value by using the stock as collateral for a loan from a Boston bank to satisfy a personal debt and Scheer made

off with about $25,000 more by representing to the Bank of North America that the stock belonged to him and pledging it with the bank for a loan in this amount which Scheer put in his pocket. This was plain, ordinary stealing.

It should come as no surprise that the brokerage firm became bankrupt and it ceased doing business in October 1971. It had probably been insolvent as early as the time of the $25,000 Marando "shylock" loan in October 1970. The collapse of Kelly, Andrews & Bradley was immediately followed by investigations by the SEC and by the United States Attorney in the Southern District of New York.

In early November 1971 the SEC got in touch with Scheer and so did a representative of the prosecutor's office in the Southern District of New York. At about this time Marando visited the brokerage firm's mid-town office at 747 Third Avenue and told Scheer, in the presence of Miller, that an investigation was under way. He asked Scheer if he had been subpoenaed, and when he said "no," Marando told him "please don't hurt me, I am sick, please don't hurt me." This was the beginning of the conspiracy. As we shall see, Cioffi joined the conspiracy in March, 1972. There was another conversation at the office in early January 1972, at which Marando in the presence of Miller said to Scheer, that he had been subpoenaed and had already appeared in the federal courthouse. On this occasion he again said to Scheer "Please don't hurt me, I am sick." Scheer testified before the Grand Jury on January 25, 1972.

Judge Motley permitted Scheer to testify to these conversations with Marando even though they occurred before the date of the conspiracy alleged in the indictment. Since Marando was named in the bill of particulars as a co-conspirator, evidence of these events preceding the conspiracy was admissible to prove the intent, purpose and aim of the parties to the conspiracy. *United States* v. *Cohen*, Dkt. #73-2121, (2d Cir., Dec. 17, 1973), slip op. p. 845.

Judge Motley instructed the jury:

> **While you have heard testimony about conversations between Marando and Scheer * * * that testimony is not proof that Defendant Cioffi committed the crimes that are charged in this indictment. We are here concerned only with a charge, as I have said, that Cioffi conspired to violate the obstruction of justice statute and the charge that Cioffi violated the obstruction of justice statute.**
>
> **The testimony about the conversations between Marando and Scheer was offered for the limited purpose of showing the motive and intent of Marando during the course of the conspiracy, if you find there was a conspiracy.**

The triple-headed investigation, by the SEC, the federal prosecutor and the FBI, at first related generally to the affairs of the brokerage firm and particularly to the manipulation of an issue of stock of All-State Metal Stamping Co., but it soon proliferated. Information about the $25,000 "shylock" loan by Marando must have trickled in slowly. But Marando had been alerted to the danger. This brings us to the activities of Cioffi and his involvement in the conspiracy to tamper with Perry Scheer, who Marando expected would be called to testify before the Grand Jury as a witness. Marando, of course, knew that Scheer would be a key witness as the loan was made to him and his two associates Schiffman and Miller, he had signed the demand note and he had repeatedly seen the "vig" paid in "green" to Marando. Scheer had personal knowledge of just about everything there was to know about the $25,000 loan.

II

What Cioffi Said and Did

Perry Scheer had an uncle named Alex Goldstein who had for many years been an officer of one of the Locals of the Teamsters Union. Goldstein got a phone call from another member of the union named Pinter who wanted to see him. At the appointed hour, outside the Coliseum where Goldstein worked, there turned up not Pinter but two men whom Goldstein had never seen before, one of whom turned out to be Cioffi, a total stranger. While the other unidentified man stood nearby, Cioffi asked Goldstein if he could talk to him about his nephew Perry Scheer who "had a problem." They went to a restaurant across the street for coffee. Cioffi opened up an attache case and started taking out a lot of papers but Goldstein said he wasn't interested in any papers. The upshot was that Goldstein, who promptly started to call Cioffi by his first name, "Sal," arranged over the phone for a meeting at the Coliseum at 5:30 P.M. on March 30, 1972 to be attended by Sal and Perry. This was confirmed by Goldstein's diary, which was received in evidence. The meeting took place as scheduled, and the unidentified man came, too. At Cioffi's request another meeting was set up and it took place a week later.

It would be tedious to describe the details of what Cioffi said at these meetings, as a number of subsequent conversations in person and over the telephone were recorded and played for the jurors. It is sufficient to say that there were repeated references to Scheer's wife and assurances that he would not be held responsible for the repayment of the $25,000 loan or the "vig." Cioffi tried to get Scheer to read what purported to be notes of what had occurred before the Grand Jury but Scheer held off. The main thrust was to get Scheer to go to Brooklyn to

see Marando and be "fortified." There was also the suggestion that Scheer should testify that Bassani had made the loan. But Scheer was "scared" and he decided the last place in the world he wanted to go was to Brooklyn to confer with Marando. Bassani was another one of the registered representatives in the office of Kelly, Andrews & Bradley.

At this point Scheer was cooperating with the FBI and, in anticipation of another meeting with Cioffi on May 18, 1972, Scheer was equipped with recording equipment. By this time Marando and his supporters had become suspicious of Scheer. When he met with Cioffi on May 18 he was patted down but not in the place where the recorder was attached to Scheer's person. A certain amount of putting his hand in front of his mouth also was of little avail to Cioffi as most of the recording was clear enough to be understood by the jurors.

At the trial the tapes were played again and again, when they were received in evidence, during the prosecutor's summation and, at the request of the jurors, during their deliberations. The jurors were furnished with transcripts for their convenience. While the words and phrases used by Cioffi were not in Aesopian language, they were probably used at least partially to conceal the real purport of the messages conveyed by Cioffi from Marando to Scheer, in case anyone else heard the conversations, and Scheer was permitted to state what these words and phrases used by Cioffi meant to him. While defense counsel objected to this in the most emphatic manner, we think the authorities support Judge Motley's ruling on the point. *Wiley* v. *United States*, 257 F.2d 900 (8th Cir. 1958); *Parente* v. *United States*, 249 F.2d 752 (9th Cir. 1957); and *Batsell* v. *United States*, 217 F.2d 257 (8th Cir. 1954). Moreover, we rather suspect that the jurors knew what these words and phrases were understood by

Scheer to mean, anyway. At least we understand them without difficulty. The sum and substance of the May 18, 1972 recording, which destroyed every vestige of Cioffi's defense, was that Scheer should agree with all the others to "take the Fifth" and say nothing or that he should come to Brooklyn to see Marando, let Marando get a lawyer for him, and then tell the lawyer what Marando told him to say. Marando was represented as "on top of" the whole affair. It is not surprising that Scheer was "scared" and was afraid to go to Brooklyn to see Marando.

Other conversations were also recorded but they do little more than repeat in one form or another what had been said before by Cioffi.

On May 18, 1972 the Grand Jury in the Southern District of New York handed down an indictment charging Marando with making a $25,000 extortionate loan to Schiffman, Scheer and Miller and specifying the following dates on which "express and implicit threats of violence" were alleged to have been made in connection with the collection of the loan: February 10, 1971; February 17, 1971; February 23, 1971; March 9, 1971; March 23, 1971 and September 28, 1971. This indictment was sealed and it was ordered unsealed on June 21, 1972. On July 3, 1972 a lawyer representing Marando appeared and entered a plea of not guilty. Marando was not in court at the time.

Goldstein testified that on July 7, 1972 he received a message from Cioffi and set up a meeting with Cioffi for July 10. This meeting led to a further meeting with Cioffi late in July or early August. At this meeting Cioffi produced two long sheets attached to each other. Cioffi wanted Goldstein to read this document and get Scheer to write out a statement "that he was never threatened or intimidated in any way." Thinking the best way to get the dates was to cut off the bottom part of the second sheet containing the dates, and the words "(Title 18, United States Code,

Sections 891, 894 and 2)," followed by the signatures of the foreman of the Grand Jury and Whitney North Seymour, Jr., the United States Attorney, and a seal. It is clear to us that what Cioffi brought with him and handed to Goldstein was a copy of the two-page indictment against Marando, handed down on May 18. The upshot was that Goldstein tore off the bottom part of page 2 with the dates, the notation, the signatures and the seal and he gave the balance of the document back to Cioffi after having photostated the part he had torn off. Indeed, Goldstein recognized the document as having been the same as the one handed to him by Cioffi, and the piece that had been photostated fitted the rest of the page perfectly. We do not think it was error to receive this document in evidence. It was not offered to prove the truth of the contents but rather to clarify the meaning of the conversation between Goldstein and Cioffi, for its bearing on the purpose and intent of Cioffi.

III

The "Defense"

As Cioffi did not testify and no witnesses were called on his behalf it seems anomalous to refer to his "defense." But his counsel was resourceful and there were two lines of so-called "defense."

The tapes showed that a considerable part of the conversations between Cioffi and Scheer had to do with the endeavor by Marando to get Scheer to permit him to pay off the balance due on Scheer's loan from the Bank of North America secured by the Brooklyn Poly Industries stock and get this stock back to Marando, the true owner. There was nothing illegal or conspiratorial about Marando's efforts to get this stock back. The picture of Marando sending an emissary to induce Scheer to co-

operate in restoring to Marando the stock Scheer had stolen from him may seem incongruous, but such is life. The claim of defense counsel was that the conversations between Cioffi and Scheer, including those recorded on the tapes, related exclusively to the Brooklyn Poly Industries *stock and had nothing to do with any prospective testi*mony by Scheer concerning the $25,000 "shylock" loan and the "vig." This "defense" blew up by itself as the record, including the tapes, make it perfectly clear that a good part of what was said by Cioffi was designed to induce Scheer either to "take the Fifth" and help get the other participants in the transaction to do the same or to go to Brooklyn and let Marando explain what his story was to be and get a lawyer for him. The second part of the defense strategy was to enter upon such a prolonged cross-examination of Scheer with respect to his many criminal acts as to turn the case into a trial of Scheer for his wrongdoings instead of a trial of the issues relating to Cioffi's attempt to obstruct justice by inducing Scheer to remain silent or to deny that Marando made the extortionate loan and collected the $500 a week in "green." One of Cioffi's principal claims of error is that Judge Motley refused to permit counsel to do this. The record is replete with evidence of the commission of criminal acts by Scheer, although it seems that he had never been convicted. We have already referred to some of the more serious of these criminal acts. By his own admission on the witness stand he was guilty of criminal violations of the securities laws in connection with underwritings and sales of the stock of Lady Goldie Bracelets, N.A.P. Industries, Cadgie Taylor, All-State Metal Stamping Co., Bel-Aire Financial and Fashion Week. Scheer admitted those acts of serious misconduct, the prosecution stipulated on the subject and it was also stipulated that in the Spring of 1973 he was told

that he would not be prosecuted and was given immunity. All this material affecting Scheer's credibility was referred to again and again in defense counsel's summation. We hold that there was no abuse of discretion in limiting the cross-examination of Scheer under the circumstances of this case and we shall make no further reference to the subject in this opinion.

IV

The Obstruction of Justice Act, 18 U.S.C., Section 1503 was Properly Interpreted and Applied by Judge Motley

In Cioffi's brief we are told again and again that there was no proof of threats or intimidation by him and that no conviction for violation of that statute can be sustained unless the jury was instructed to acquit Cioffi in the absence of proof of such threats or intimidation. We hold that there was proof of threats or intimidation and we also hold that Judge Motley properly instructed the jury that a verdict of guilty might be based on intimidation by threats or by corruptly endeavoring to influence the witness Scheer to give false testimony or by corruptly influencing him to invoke the Fifth Amendment.[2]

The statute is plainly in the disjunctive, "or." Moreover, there is no requirement that there be proof of direct threats or the actual use of force. The continual references to

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2 "The obstruction of justice statute may be violated in various ways. First, the statute may be violated if the witness is intimidated by a threatening communication. As you know, intimidation includes frightening a person, inspiring or affecting him by fear or deterring him as by threats.

Second, the statute may also be violated if a witness is corruptly influenced to give false testimony before a grand jury, and third, the statute may also be violated if a defendant endeavors to corruptly influence a witness to invoke the Fifth Amendment privilege to remain silent before a grand jury."

Scheer's wife, against the background of Marando's earlier statement of what he would do if the "vig" was not paid, were enough. She was Scheer's Achilles' heel. It is not surprising that he was "scared" and winced at every mention of her in his conversations with Cioffi. The whole tenor of the various phases of the messages from Marando, as delivered by Cioffi, was that he had better do what he was told, or else. And so the jury would have been justified in believing Scheer's testimony that he was physically afraid to go to Brooklyn to be "fortified."

As Judge Motley so aptly said, the key words in the statute are "corruptly" and "endeavors." The endeavor, whether successful or not, is the gist of the offense. *United States* v. *Russell,* 255 U.S. 138 (1921). Knowing that the loan had in fact been made and the extortionate interest paid, all to the personal knowledge of Scheer, an endeavor to induce Scheer to deny the making of the loan, or to pass it off on Bassani, or to plead the Fifth Amendment for the purpose of protecting Marando, was obviously corrupt. Judge Motley defined endeavor as "any effort or any act, however contrived, to obstruct, impede or interfere with a witness," and she told the jurors that any such endeavor is corrupt. There is no requirement that any sort of money or other consideration be received before the endeavor can be considered corrupt. *United States* v. *Polakoff,* 121 F.2d 333 (2d Cir), *cert. denied,* 314 U.S. 626 (1941); *Bosselman* v. *United States,* 239 Fed. 82 (2d Cir. 1917); *Broadbent* v. *United States,* 149 F.2d 580 (10th Cir. 1945).

Cioffi insists that the mere giving of advice to a witness to plead his constitutional privilege against self-incrimination cannot be made a crime. But here we have something more than "mere" advice. The correct view as charged by Judge Motley, and as held by the Ninth Circuit in *Cole* v. *United States,* 329 F.2d 437 (9th Cir.), *cert. denied,* 377 U.S. 954 (1964), is:

> I charge you that while a witness violates no law by claiming the Fifth Amendment privilege against self-incrimination in a grand jury, one who bribes, threatens, coerces a witness to claim it or advises with corrupt motive a witness to take it, can and does obstruct or influence the administration of justice.

The focus is on the intent or motive of the party charged as an inducer. The lawful behavior of the person invoking the Amendment cannot be used to protect the criminal behavior of the inducer. There is ample evidence that the inducer Cioffi endeavored to influence the witness Scheer.

An essential ingredient of the statute is that there must be a "witness" subject to being influenced. We hold that Scheer was such a witness.

V

Miscellanea

There are many other claims of error. We have given careful consideration to each of these and we find no merit in any of them. There is no evidence that the photographs of Marando were mug shots. And, even if that were so, it would be difficult to find any prejudice to Cioffi in view of what this record reveals of Marando's conduct. To describe Special Agent Parks' brief description of an extortionate loan as a lecture on the law and a usurpation of the judicial function of the trial judge is hardly worthy of comment. When Parks said in response to a question that he was attached to the Organized Crime Division of the FBI, no objection was made nor any request for an instruction to the jury that this was not evidence against Cioffi. Had such a request been made we have no doubt the statement would have been stricken

and the jury would have been told to disregard it. The failure on the part of Judge Motley to give such an instruction was clearly not "plain error." Nor was it error to admit Scheer's testimony of some conversations with Goldstein that had not been covered in the prosecution's direct examination of Goldstein. When Goldstein reported to Scheer what Cioffi had told him to tell Scheer, these conversations were all in furtherance of the conspiracy and hence admissible. *United States* v. *Montgomery,* 440 F.2d 694 (9th Cir.), *cert. denied,* 404 U.S. 884 (1971). The objection that Marando was not named in the indictment as a co-conspirator but was named as such only in the bill of particulars is frivolous.

Affirmed.

APPENDIX B

ORDERS OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of April, one thousand nine hundred and 74

Present:

HON. HAROLD R. MEDINA

HON. LEONARD P. MOORE

HON. JAMES L. OAKES

Circuit Judges

Docket No. 73-2612

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

SALVATORE CIOFFI,

Defendant-Appellant.

Orders of United States Court of Appeals

A petition for a rehearing having been filed herein by counsel for the APPELLANT

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of April, one thousand nine hundred and seventy-four.
Docket No. 73-2612

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

SALVATORE CIOFFI,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc, having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judge Timbers did not participate in the consideration or decision of this petition.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX C

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of March, one thousand nine hundred and '74.

Present:

Hon. Harold R. Medina

Hon. Leonard P. Moore

Hon. James L. Oakes,

Circuit Judges.

Docket No. 73-2612

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

SALVATORE CIOFFI,

Defendant-Appellant.

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1727

SALVATORE CIOFFI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in admitting in evidence tape recorded conversations between petitioner and a government witness who consented to the recording, that the evidence was insufficient to sustain the charges of obstruction of justice, and that the district court erred in permitting a government witness to testify as to his interpretation of certain recorded conversations to which he was a party.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to obstruct and obstruction of justice by corruptly endeavoring to influence a witness, in violation of 18 U.S.C. 371 and 1503, respectively. He was sentenced to terms of 18 months' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A, 1a).

Through the testimony of Perry Scheer, corroborated by tape recordings and by the testimony of his uncle, Alex Goldstein, the government proved that petitioner and others tried to prevent Scheer from testifying before a federal grand jury about an extortionate loan transaction perpetrated by an associate of petitioner, Joseph Marando. From June 1970 to October 1971, Perry Scheer was a registered representative with Kelly, Andrews and Bradley (hereinafter "KAB"), an over-the-counter brokerage firm (A. 86a-87a).[1] In October 1970, Scheer was one of three persons associated with KAB who signed a promissory note for a $25,000 loan from Joseph Marando, at an interest rate of 104% a year (A. 115a-116a). Marando collected weekly payments of $500 cash, and when payments were not timely made, Marando threatened physical harm and violence to the borrowers and also threatened that he would send "collectors to our home to take our wives or our furniture, whatever he could get" (A. 116a).[2]

Petitioner's involvement began in March 1972, after the brokerage firm was the subject of multiple governmental investiations (Pet. App. A, 6a-8a). Perry Scheer's uncle, Alex Goldstein, a union-local officer, was contacted by a man who identified himself as Mr. Pinter, who asked to meet with him, which Goldstein agreed to do (T. 37-39).[3] However, instead of Pinter, petitioner and another person appeared at the meeting. Petitioner told Goldstein that his nephew Perry Scheer had a problem and asked Goldstein to arrange a meeting between petitioner and Scheer (T. 40-42).

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[1]"A." refers to the Appendix in the court of appeals.

[2]On May 18, 1972, an indictment was filed charging that Marando's $25,000 loan was an extortionate extension of credit and that on dates specified in the indictment Marando had illegally used threats of violence to collect payments from Scheer and others (Government Exhibit 4).

[3]"T." refers to the transcript of the trial.

Petitioner then met with Perry Scheer on March 30, 1972. Petitioner told Scheer that he had met with Marando, that he had heard about KAB's difficulties, and that he understood about Scheer's situation with his wife (Scheer's wife was totally disabled and bedriden with cancer. (A. 114a). Petitioner told Scheer to forget about the balance of the $25,000 loan and the interest due on it. Finally, petitioner said he wanted to check back with Marando, and that he might contact Scheer again (A. 110a-113a).

In early April 1972, Goldstein again arranged for petitioner to meet with Scheer (T. 46). At this meeting petitioner said he was aware of the grand jury investigation of KAB and offered to let Scheer read notes that petitioner said showed "what people who were brought before the grand jury had said." Scheer refused the offer (A. 118a). Petitioner then told Scheer that if the grand jury asked him about the $25,000 loan he should say that the loan was to a Mr. Bassani as well as himself and that Marando was collecting from Bassani, not him. Petitioner asked Scheer to accompany him to Brooklyn to see Marando who would "fortify" him and "make him strong" so he knew what was happening and "could communicate it as such". Scheer did not go to see Marando because he was afraid. A few weeks later Scheer informed the government about the meetings with petitioner (A. 118a-120a).

After Scheer testified before the grand jury for a second time on April 27, 1972 (A. 120a), petitioner arranged with Goldstein to meet Scheer again, on May 18, 1972. Prior to this meeting the FBI, with Scheer's approval, placed recording equipment on him (A. 121a).[4]

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[4]In addition to the May 18, 1972, meeting with petitioner, conversations were recorded on May 25, 1972, May 31, 1972, and June 1, 1972. These tape recordings were received in evidence at trial (Government Exhibits 6, 7, 8, and 9).

Scheer testified as to what took place at the meeting (A. 122a-123a):

> Mr. Cioffi asked me if my wife could take a ride to Brooklyn. I said she could not. He asked me if she was being attended to at home and was she accounted for and I said she was, she could not move and she could not go anywhere. He told me it was important for me to go to Brooklyn, to sit down with Joe [Marando] who would help me. He would direct me. He would fortify me and make me strong. He would tell me what to tell a lawyer that he would hire for me and pay for me before I testified in the grand jury. He told me that Joe was on top of everything and talking to everyone and that it would help me to know what is happening and Joe can tell me since he is discussing everything with everyone involved. I asked him, Mr. Cioffi, that is, if he was discussing it with Mr. Schiffman and Mr. Cioffi said Mr. Schiffman will do everything or anything you tell him and he already took the fifth, get my point, meaning I should take the fifth if called and the government would * * * not have a case.

Petitioner also told Scheer, " * * * you gonna tell just what he [Marando] tells you because it's gonna be secured from other parties" (Government Exhibit 6-A, p. 31).

On the same day, May 18, 1972, as noted above, the indictment was returned by the grand jury charging Marando with extortionate extension of credit and charging that on dates specified in the indictment Marando had illegally used threats of violence to collect payments from Scheer (Government Exhibit 4).

In late July or early August 1972, petitioner visited Goldstein and asked him if he would get Scheer to put

in writing that he was never threatened or intimidated on the dates specified in the Marando indictment, a copy of which petitioner had with him (Pet. App. A, 10a-11a).

The defense presented no evidence.

1. Petitioner contends that the district court erred in admitting the tape recorded conversations between petititioner and Scheer. Petitioner did not object to the admission of these recordings at trial (T. 487) and did not raise this issue in the court of appeals.[5] Therefore, petitioner should not be permitted to raise the issue before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, this contention is without merit.

The contention is bottomed on the mistaken notion that, absent petitioner's consent to the recordings, a court order was required. However, Perry Scheer's consent to the recordings of his conversations with petitioner is undisputed. Where an individual consents to the recording by government agents of his conversations with another, the agents do not need to secure a warrant prior to the recording. *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293; *United States* v. *Marrapese*, 486 F. 2d 918, 921 (C.A. 2), certiorari denied, March 25, 1974, No. 73-916.[6].

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[5]Petitioner did object at trial and in the court of appeals to Scheer's interpreting the tapes and did object in the court of appeals to the submission of transcripts of the recordings to the jury (Br. 34). The latter issue is not raised in the petition.

[6]Warrantless tape recording by government agents of conversations pursuant to the consent of a party to the conversations is not a violation of Title III, Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. 2511(2)(c).

2. Petitioner also contends that the evidence was insufficient to prove that he endeavored to obstruct justice. The evidence, however, as set forth above, clearly showed that petitioner endeavored to have Scheer take the Fifth Amendment or lie to the grand jury. As the court of appeals stated (Pet. App. A, 14a):

> The whole tenor of the various phases of the messages from Marando, as delivered by Cioffi, was that he had better do what he was told, or else.

Petitioner endeavored to have Scheer either give false testimony or take the Fifth Amendment before the grand jury. However, assuming *arguendo* that petitioner's efforts were solely directed toward having Scheer plead the Fifth Amendment, this would be sufficient to sustain his conviction under 18 U.S.C. 1503, because petitioner's efforts were made corruptly. *Cole* v. *United States,* 329 F. 2d 437, 443 (C.A. 9), certiorari denied, 377 U.S. 954; Pet. App. A, 14a.[7]

3. Petitioner cites no authority to support his contention that the trial court committed reversible error in permitting Perry Scheer to testify as to his interpretation of certain language used by petitioner in the tape recorded conversations with him. It is well settled that "[a] witness may

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[7]Contrary to petitioner's assertion (Pet. 24) no conflict exists in the circuits regarding this issue. The Ninth Circuit is in agreement with the Second Circuit that it is a violation of 18 U.S.C. 1503 corruptly to advise a witness to take the Fifth Amendment. *Cole* v. *United States, supra,* 329 F. 2d at 443. The Sixth Circuit only held that it is not obstruction of justice to submit a false affidavit in connection with a motion for a new trial. *United States* v. *Essex,* 407 F. 2d 214, 217. The district court in the Western District of Pennsylvania held that the FBI is not engaged in the administration of justice within the terms of 18 U.S.C. 1530. *United States* v. *Scoratow,* 137 F. Supp. 620.

* * * testify as to what he understood to be the true meaning of the words used by another." *James Bakalis & Nickie Bakalis, Inc.* v. *Simonson*, 434 F. 2d 515, 518, n. 5 (C.A. D.C.); *Wiley* v. *United States*, 257 F. 2d 900, 908 (C.A. 8).

4. In the Questions Presented (Pet. 3), petitioner contends that his cross-examination of Scheer was improperly limited by the district court. This contention is not argued in the petition, and is without merit.

On direct examination Scheer admitted that he had made illegal cash payments to induce brokers to sell securities to their customers in connection with seven underwritings (A. 159a). Petitioner was permitted to cross-examine Scheer about his motives for testifying, particularly about his participation in these illegal activities and the immunity he received with regard to them (A. 241a-245a, 268a-269a); however, petitioner was not permitted to cross-examine as to the underlying details of these violations (A. 192a). Having allowed Scheer's illegal activities and his immunity to be shown, the district court acted well within its discretion in limiting further cross-examination with respect to these underlying details. *United States* v. *Miles*, 480 F. 2d 1215, 1217 (C.A. 1); *United States* v. *Kahn*, 472 F. 2d 272, 280-281 (C.A. 2), certiorari denied, 411 U.S. 982.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.